(10)

No. 97-1192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SWINDLER & BERLIN AND JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Bar Association, has a keen interest in attorney-client confidentiality, which is directly affected by issues involving the scope of the attorney-client privilege and the attorney work-product doctrine.[1] The many members of the ABA who practice law are directly affected by decisions limiting the scope of the privilege and requiring production of communications with their clients, and their client relationships are impaired by such decisions.

The ABA has long taken a leading role in developing standards governing the preservation of client confidences. In 1908, the ABA adopted its Canons of Professional Ethics, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences" and that "[t]his duty outlasts the lawyer's employment." The ABA's Model Code of Professional Responsibility, adopted in 1969, similarly required a lawyer to protect client confidences and secrets both during a representation and after it ended. The Model Rules of Professional Conduct promulgated by the ABA in 1983, which reflect the ABA's current policy, continue to provide that the obligation to preserve confidences remains after the the attorney-client relationship ends. The ABA's Standing Committee on Ethics and Professional Responsibility takes the view that this obligation continues after the client's death.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA recognizes that the ethical obligation to preserve client confidences and the legal protections embodied in the attorney-client privilege and work-product doctrine are related and serve the same general goals. Indeed, without these legal protections, the lawyer's ethical obligation to preserve confidences could be considerably impaired. As Comment [5] to ABA Model Rule 1.6 explains:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Because of the relationship between the privilege and the ethical principles it reinforces, the ABA takes an interest in important issues involving the scope of the privilege.

In addition, through its Litigation and Criminal Justice Sections, the ABA seeks to define the roles of lawyers in civil and criminal litigation and to improve the civil and criminal justice systems. This case directly implicates these goals. The ABA also seeks, through its Commission on Legal Problems of the Elderly, to improve legal services for the elderly—an objective that has been adversely affected by the decision below, which weakens the attorney-client privilege after the client's death and may have a significant impact on the elderly and others who seek legal services in anticipation of death.

These interests lead the ABA to support the petitioners' position, for the reasons stated below. Both the petitioners and the respondent have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the District of Columbia Circuit marks a substantial departure from the "principles of the common law" as they have historically been "interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. It represents the first time a federal court has ruled that the death of a client so weakens the attorney-client privilege that it may be overcome based on a court's balancing of the government's claimed need for privileged information against the client's interest in confidentiality.

This novel ruling, while directly applicable only to federal criminal proceedings, has the potential to affect attorney-client relationships nationwide and to impair the goals of the ethical principles that require attorneys to protect client confidences. It undermines the certainty of clients and attorneys everywhere that their communications will remain confidential, and it may confound many thousands of persons who, anticipating their own death, seek the advice of attorneys to assist in ordering their affairs.

Indeed, it is fair to assume that hundreds of thousands if not millions of Americans live today—in hospitals, nursing homes, hospices, or in their own homes—in the expectation that they may soon die, whether from disease, old age, or occupational perils, or—like the client in this case—by their own hands. Many of these people undoubtedly have secrets and confidences that, if revealed, would be at the least highly embarrassing to themselves or their friends and loved ones. These might include wrongs done to others by themselves, their friends, or members of their families; hidden assets or financial transactions; or illegitimate children or relationships. Countless other examples could be given.

The attorney-client privilege exists in large part because disclosure to lawyers of confidences such as these enables

people to obtain advice and assistance to guide future actions or to rectify or ameliorate the consequences of past actions. Absent the assurance of confidentiality, such disclosures likely would never be made. The existence and integrity of the attorney-client privilege does not obstruct the truth-finding process. Instead, it promotes disclosure of the truth to lawyers and fosters actions available under the law to redress wrongs that might otherwise be left undiscovered and unaddressed. Decisions such as the one below threaten to impede these important aims.

This is not, it should be emphasized, a case involving the proposed creation of a new privilege, or the expansion of an existing one into hitherto unprotected areas. Such expansions of privilege may be problematic or controversial, *see, e.g., Jaffee v. Redmond*, 116 S. Ct. 1923, 1933 (1996) (Scalia, J., dissenting), and the courts have traditionally stepped carefully in such matters. The issue here, however, is whether a firmly entrenched privilege is to be scaled back through the creation of a new exception wholly at odds with its history and purposes. The burden of establishing that "reason and experience" justify such curtailment of the privilege has not been met, and the Court should not allow the perceived needs of the moment to override the weight of history, tradition and policy that support the privilege.

The lower court's opinion is equally destructive of another critical protection afforded by the law to communications and other materials created by lawyers in the course of representing their clients: the work-product doctrine. Crafted by this Court over the course of half a century, this doctrine helps to protect the adversary system by creating a zone of protection for the mental impressions lawyers develop in anticipation of litigation—*i.e.*, for "opinion work product." Although the attorney notes sought by the Independent Counsel in this case lie at the center of

this protected zone, the D.C. Circuit did not grant them the heightened protection that the work-product doctrine affords such materials. The lower court's rationale for denying the notes such protection rests on an arbitrary distinction between initial client interviews and subsequent interviews conducted by attorneys in anticipation of litigation—a distinction that fails to accord with either reason or the experience of practicing lawyers.

ARGUMENT

I.

THE D.C. CIRCUIT'S NEWLY CREATED EXCEPTION IS AN UNWARRANTED DISTORTION OF THE LAW OF PRIVILEGE

A. The Law of Privilege in Federal Courts Is Based on Common-Law Principles Developed in the Light of Reason and Experience

Federal Rule of Evidence 501 provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Rule, and the privileges whose development it authorizes, applies in both civil and criminal proceedings, including grand jury proceedings. *See* Fed. R. Evid. 1101(b)-(d).[2]

Rule 501 reflects congressional intent that questions of privilege arising in federal proceedings be decided on the basis of "a federally developed common law based on

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[2] *See also In re Grand Jury Investigation*, 918 F.2d 374, 379 (3d Cir. 1990) ("Under Federal Rule of Evidence 1101, Rule 501 is applicable to grand jury proceedings."); *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) ("It is now clear, however, that discovery by the Government in grand jury proceedings is subject to the attorney-client privilege as developed at common law . . . .") (citing Fed. R. Evid. 1101(c) & (d)).

modern reason and experience." Fed. R. Evid. 501, Advisory Comm. Notes. Consistent with Congress' intent, this Court has recognized that the role of the federal courts under Rule 501 is not to engage in unfettered judicial legislation, but to elaborate rules of privilege within the framework of existing legal principles that together define the prevailing norms of privilege applied by American courts:

> The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."

Trammel v. United States, 445 U.S. 40, 47 (1980).

In carrying out the evolutionary task set for them by Rule 501, federal courts look to all the sources of guidance traditionally used by courts in articulating common-law rules.

> Both the history and the language of Rule 501 . . . provide us with a mandate to develop evidentiary privileges in accordance with common law principles. This mandate, in turn, requires us to examine federal and state case law and impels us to consult treatises and commentaries on the law of evidence that elucidate the development of the common law.

In re Grand Jury Investigation, 918 F.2d 374, 379 (3d Cir. 1990).

Thus, in its decisions on issues of privilege under Rule 501, this Court has examined prior federal and state case law, *see, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981), as well as scholarly commentary, *see, e.g., Trammel v. United States*, 445 U.S. 40, 50 & n.11 (1980). The Court has also recognized that proposed Federal Rules of Evidence 501 through 513, submitted to Congress but not adopted

when the Rules were approved in 1975, reflect "reason and experience" entitled to significant weight. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930-31 (1996); *see also United States v. Gillock*, 445 U.S. 360, 367-68 (1980). Similarly, because "the existence of a consensus among the States indicates that 'reason and experience' support recognition of [a] privilege," this Court has recognized that "the policy decisions of the States"—as reflected both in state-court decisions and state legislation—"bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 116 S. Ct. at 1929-30. In addition, the Court has looked to "accepted norms of professional conduct" (including ABA ethical standards) bearing on confidentiality in determining the extent to which legal protection should be extended to confidential communications. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).[3]

The use of an incremental, precedent-based approach to resolving issues of privilege has meant that this Court "has rarely expanded common-law testimonial privileges" into new areas, *In re Grand Jury Proceedings*, 103 F.3d 1140, 1149 (3d Cir. 1997) (declining to adopt a parent-child privilege), although the Court has recognized "new" privileges when they have been based on a demonstrable consensus among the relevant sources of authority. *See Jaffee v. Redmond*, *supra* (accepting psychotherapist-patient privilege). By the same token, in recognition that "the long history of [a] privilege suggests that it ought not to be casually cast aside," *Trammel v. United States*, 443 U.S. at 48, the Court has generally protected privileges that are

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[3] *See also Jaffee v. Redmond*, 116 S. Ct. at 1928 & n.9, 1930 n.12 (relying in part on view of professional organizations regarding the need for confidentiality, and on prevailing ethical standards, in recognizing psychotherapist-patient privilege).

"indelibly ensconced in our common law," *United States v. Gillock*, 445 U.S. at 368, and has enforced such privileges as required to carry out their underlying purposes. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562 (1989); *Upjohn v. United States*, 449 U.S. at 390-97.

B. The Attorney-Client Privilege Is Fundamentally Important to Our System of Justice

No privilege is more "indelibly ensconced" in the common law than the attorney-client privilege. This Court has long recognized the significant public policies the privilege serves and its importance to the administration of justice under law:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated ... in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon

> the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. United States, 449 U.S. at 389; *accord, CFTC v. Weintraub*, 471 U.S. 343, 348 (1985). More succinctly, the Court has stated that the privilege is "rooted in the imperative need for confidence and trust" between lawyer and client. *Trammel v. United States*, 445 U.S. at 51; *accord, Jaffee v. Redmond*, 116 S. Ct. at 1928.

The American Bar Association has similarly emphasized the critical importance of attorney-client confidentiality and has promulgated model ethical standards that reinforce the obligation of confidentiality protected by the privilege. The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct describe the policies underlying the ethical requirement of attorney-client confidentiality in terms that parallel those used by this Court in *Upjohn*:

> [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> [3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

> [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

C. The Common Law Recognizes that the Privilege Survives the Client's Death

The attorney-client privilege and the parallel ethical obligation to preserve client confidences traditionally have not been thought to be temporally limited. Comment 22 to the ABA's Model Rule 1.6 expresses the general principle: "The duty of confidentiality continues after the client-lawyer relationship has terminated." Judicial formulations of the privilege have long expressed a similar view. In an influential early opinion, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts wrote:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts *the mouth of the attorney shall be for ever sealed.*

Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1834) (emphasis added).

Justice David Brewer put the matter similarly in an opinion written shortly before his appointment to this Court:

> [I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that *that lawyer's tongue is tied from ever disclosing it* . . . .

United States v. Costen, 38 F. 24 (C.C.D. Colo. 1889) (emphasis added).

The late Judge Irving Kaufman expressed the same principle in his much-cited opinion in *United States v. Standard Oil Co.*, 136 F. Supp. 345, 355 (S.D.N.Y. 1955):

> The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians. It is traditional in the legal profession that the fidelity of a lawyer to his client can be depended upon. The client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him.

The view that the privilege does not lapse with time is reflected in a consistent body of federal and state caselaw holding that the privilege survives the death of the client. As one author has summarized the rule:

> [T]he privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.[4]

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[4] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 234 (ABA Sec. of Litigation 3d ed. 1997); *accord* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED

The same view has found expression in the proposed final draft of the American Law Institute's Restatement (Third) of the Law Governing Lawyers, which states that "[t]he privilege survives the death of the client";[5] in Dean Wigmore's treatise, which says that "the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*";[6] in Judge Weinstein's treatise on evidence, which expresses "the general rule that the lawyer-client privilege survives the death of the client";[7] in Professors Hazard's and Hodes's treatise on *The Law of Lawyering*, which states that "since confidentiality (and the attorney-client privilege) are designed as inducements to speak at the time of the client-lawyer consultation, it is almost universally held that the lawyer's duty to maintain silence survives not only the relationship but also the death of the client";[8] and in this Court's proposed Federal Rule of Evidence 503, which would have provided for the survival of the privilege after the client's death.[9]

The ABA's Ethics Committee summarized the rationale for the survival of the privilege in its Informal Opinion 1293:

STATES § 2:5, at 69 (Law. Coop. 1997) ("In all circumstances, other than the will contest exception, the privilege survives the death of the individual client . . . .").

[5] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. c, at 431 (Proposed Final Draft No. 1 1996); *see also id.* § 112, cmt. e, at 280 ("The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client.").

[6] 8 J. WIGMORE, EVIDENCE § 2323, at 631 (McNaughton rev. 1961).

[7] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.32, at 503–96 (2d ed. 1997).

[8] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.6:101, at 131 (1998).

[9] *See* PROPOSED FED. R. EVID. 503(c) ("The privilege may be claimed by . . . the personal representative of a deceased client . . . .").

> [T]here is no rule or reason to say that any such confidences and secrets should not be preserved indefinitely. Any other rule would mean that promptly upon the death of a client the privilege would be annulled and the attorney would be at liberty to disclose information which had been confided in him by the client while alive. This, to say the least, could lead to numerous serious problems involving the client's representatives, surviving relatives and business associates. Such a concept would be in contravention of the very purpose of the privilege.[10]

The general principle of survival of the privilege has long been viewed as having one exception: the so-called "will contest" exception, under which attorney-client communications relating to estate planning matters are not privileged if "sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client." *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977); *see also Glover v. Patten*, 165 U.S. 394, 408 (1897). The exception has been narrowly confined to these circumstances, in which it is "necessary to a proper fulfillment of the testator's intent." *Osborn*, 561 F.2d at 1340, n.11; *see also Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. 1996) (declining to expand exception to situation where there was no pending litigation contesting a will), *appeal denied*, 679 N.E.2d 380 (Ill. 1997). Outside of the will contest situation, traditionally there has been no exception to the privilege's survival. "The only context in which a client's death might affect the viability of the privilege is a will contest." *Hitt*, 675 N.E.2d at 278. Or, as one leading treatise puts it, "[a] will contest is the *only*

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[10] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1293 (1974) (Maintenance of Confidences and Secrets of a Deceased Client).

exception to the general rule that the privilege survives the death of a client."[11]

D. The Lower Court's Revision of Privilege Law Fails to Comport with Reason and Experience

1. "Balancing Tests" Are Inimical to the Purposes of the Privilege

Although the D.C. Circuit's opinion does not purport to abrogate the privilege altogether upon the client's death, it fundamentally transforms the privilege by subjecting it to a court's balancing of the need for the information against the interests served by confidentiality. The D.C. Circuit's ruling is a departure from the ordinary rule that the attorney-client privilege, unlike privileges or protections that are qualified, "'cannot be overcome by a showing of need.'"[12] It is black-letter law that "[a]bsent a waiver of the protection, . . . the privilege precludes the disclosure of the communications regardless of the need that might be demonstrated for the

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[11] RICE, *supra*, § 2:6, at 70 (emphasis added); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d, at 431 (Proposed Final Draft No. 1 1996) (except for the will contest exception, "[t]he law recognizes no exception to the rule" that the privilege survives); *id.* § 127, Reporter's note to cmt. c (outside the will contest exception, "other cases are encountered and they routinely hold that the privilege survives").

[12] *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (quoting Saltzburg, *Corporate and Related Attorney-Client Privilege: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 299 (1984)); *see also In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (noting that attorney-client privilege is not a qualified privilege subject to a balancing test); *Mason C. Day Excavating, Inc. v. Lumbermens Mut. Cas. Co.*, 143 F.R.D. 601, 609 (M.D.N.C. 1992) ("Unlike work product protection, under . . . federal common law . . . , the attorney-client privilege does not implicate a balancing test wherein the privilege may be disregarded solely because the opposing party can show a sufficient need for the information.").

information in them."[13] As the proposed final draft of the Restatement puts it, "the privilege . . . is not subject to ad hoc exceptions" based on balancing.[14]

Indeed, this Court has observed that making the protection of a confidential communication dependent upon such a balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996). The predictable effect of a balancing analysis will be for a court to give preference to the needs of a party to the matter immediately at hand over the interests of an individual who is deceased and the more generalized policy interests of society in fostering attorney-client confidences. In *Jaffee*, this Court rejected a balancing test for the newly recognized psychotherapist-patient privilege for just such reasons. Here, where what is at issue is a long-established privilege that has *never* been subject to a balancing test, it is even clearer that considerations of "reason and experience" counsel against limiting the privilege by adopting an ad hoc balancing approach.

2. The Attorney-Client Privilege Should Not Be Curtailed in Criminal Proceedings

To be sure, the D.C. Circuit states that its balancing approach will apply only in criminal or grand jury proceedings. But the lower court's creation of different privilege rules to be applied in criminal and civil matters, far from justifying its weakening of the privilege, is itself profoundly troubling. The Rules of Evidence do not distinguish among civil, criminal, and grand jury matters for purposes of applying evidentiary privileges; rather, they expressly provide that privileges recognized under Rule 501

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[13] RICE, *supra*, § 2:2, at 50 (footnotes omitted).

[14] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118, cmt. c, at 341 (Proposed Final Draft No. 1 1996).

apply fully in all proceedings. Fed. R. Evid. 1101. Indeed, the Advisory Committee Notes to Rule 501, prepared by the House-Senate Conference Committee that devised the final version of the Rule, emphasizes that the intent of the Rule was "that privileges shall continue to be developed by the courts of the United States *under a uniform standard applicable both in civil and criminal cases*" (emphasis added).

The D.C. Circuit's suggestion that the attorney-client privilege should be subject to a different standard in criminal and civil matters is a marked departure not only from congressional intent, but also from the traditional refusal of American courts to draw such a distinction. Although the decision below is on its face limited to the situation where the privilege is invoked after the death of the client, the notion that criminal and civil cases are different in kind with respect to the attorney-client privilege may not, once accepted, be easily cabined. The D.C. Circuit's decision thus stands as a troubling threat to the hitherto unquestioned rule that the attorney-client privilege is fully applicable to criminal and grand jury matters.

3. The Existence of One Carefully Defined Exception to the Survival of the Privilege Does Not Justify Creating New Exceptions Contrary to the Policies Underlying the Privilege

The existence of another, longstanding exception to the survival of the privilege—the will contest exception—cannot support the creation of a new one applicable to an entirely distinct set of circumstances. Unlike the D.C. Circuit's newly crafted rule, the existing exception is supported by over one hundred years of precedent reflecting the "reason and experience" of common law courts. Moreover, the will contest exception is based on considerations that make it extremely unlikely that it will undermine the purposes of the

privilege. As courts and scholars unanimously acknowledge, the exception is designed to effectuate the intention of the testator, and is based on the view that "a decedent would (if one could ask him) waive the privilege in order that the distribution scheme he actually intended be put into effect." *Hitt v. Stephens*, 675 N.E.2d at 278.[15] Under such circumstances, as this Court long ago recognized, disclosure "can present no impediment to a full statement to the [attorney]." *Blackburn v. Crawford's Lessee*, 70 U.S. at 193. The existence of an exception for disclosures consistent with the wishes of a decedent can in no way support creation of an exception allowing disclosures *contrary* to the decedent's intentions, for the latter, unlike the former, would naturally tend to chill attorney-client communications and thus defeat the purpose of the privilege.

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[15] *See also Glover v. Patten*, 165 U.S. at 408; *Blackburn v. Crawford's Lessee*, 70 U.S. 175, 194 (1866); *United States v. Osborn*, 561 F.2d at 1340, n.11; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131, cmt. b, at 458 (Proposed Final Draft No. 1 1996) (the will contest exception is "justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions. . . . It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers."). As the Independent Counsel has noted, it is of course not always the case that a client would consent to the disclosure of privileged communications on all matters relating to estate planning, for estate planning "may be based on considerations one would prefer never to reveal." *Hitt v. Stephens*, 675 N.E.2d at 279. But this is precisely why the courts have not created a general estate planning exception, and have confined the will contest exception to those circumstances where it is most likely that disclosure will be consistent with the decedent's wishes. *See id.* at 278-79.

4. The Lower Court's Reasoning Unduly Discounts the Chilling Effect Its Rule Will Have on Attorney-Client Communications

The D.C. Circuit justifies its substantial weakening of the privilege by its conjecture that the prospect of revelation of attorney-client confidences in criminal matters after the client's death will have little effect on the willingness of clients to confide in attorneys. Common experience—and in particular the experience of members of the ABA and other practicing lawyers—suggests that the D.C. Circuit's supposition is, at best, highly speculative. Every day, thousands of clients consult their attorneys with the object of ordering their affairs and providing for their families and loved ones in the event of their death—consultations that would not occur if clients were truly indifferent to what happened after they died.

While acknowledging that clients regularly show great concern for the effect of events after their death on the pecuniary well-being of their heirs, the D.C. Circuit nonetheless held that *criminal* matters will rarely implicate interests that will survive a client's death. The court reasoned that, by definition, the client cannot be held criminally liable after death, and it apparently assumed that the client will have little concern about the possible criminal liability of others. Moreover, the court discounted the client's possible concern with the effect of a criminal matter on his or her own reputation after death, stating that only a client with a near-Pharaonic interest in immortality would be concerned with such matters.

The court's reasoning is curious. We know that clients regularly show vital concern for their families' material well-being after their death. Why should we assume they would be less concerned about the possibility that their friends and

loved ones might face criminal penalties?[16] Moreover, even if the odd notion that people care more about their survivors' financial interests than about whether they may be prosecuted and imprisoned were true, criminal matters often have extraordinarily grave financial consequences for their subjects (and their subjects' families). A client aware that an attorney-client confidence could be disclosed to a prosecutor or grand jury after the client's death could have great reason to fear that the result would be substantial fines and forfeitures that could ruin members of the client's family—even, possibly, family members innocent of any crime. *Cf. Bennis v. Michigan*, 516 U.S. 442 (1996).

As for the supposition that the concern of clients for their reputation after their death is so slight that the prospect of disclosure will not chill attorney-client communications, it, too, seems contrary to reason and experience. The maxim that "a good reputation is more valuable than money" has survived for centuries.[17] The consciousness that reputation lives on after death is evident not only in the works of memoirists and philanthropists, but in the efforts of ordinary men and women down to their last days to maintain the good regard of their friends and neighbors.[18] The depth of this

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[16] *Cf.* FED. R. EVID. 804(b)(3) (equating statements against pecuniary interest with statements against penal interest for purposes of applying hearsay rules).

[17] PUBLIUS SYRUS, MAXIM 108 (42 B.C.).

[18] To cite only one example, President Grant—hardly a man of Pharaonic immodesty—spent the last months of his life in a successful race to complete his memoirs before he died of cancer, not only in order to secure his reputation for posterity, but also to provide the wherewithal for his family to extricate itself from the financial and legal difficulties into which he had brought it. E.B. Long, *Introduction* to ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT, xx–xxii (1952) (Da Capo Press reprint 1982).

concern is captured by Cassio's lament from *Othello*, act 2, scene 3:

> Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.

5. The Independent Counsel's Alternative "Exposure of Client Perjury" Rationale for the Result Below Is Unconvincing

In his Brief in Opposition to the Petition for Certiorari, the Independent Counsel presents an alternative argument for abrogation of the privilege in this case, based on the assertion that permitting disclosure would provide the Independent Counsel with no more information than he could have obtained if the client were still alive. The Independent Counsel contends that the facts he seeks to discover from the attorney could have been learned directly from the client if he were alive by immunizing him and calling him as a grand jury witness. If the client had then testified inconsistently with what he had told the attorney, the Independent Counsel asserts, the attorney would have been ethically obligated to reveal the confidences anyway. Thus, the Independent Counsel asserts, requiring disclosure cannot have any adverse effect on the policies underlying the privilege.

The Independent Counsel's argument is wrong on multiple levels. Under the District of Columbia's ethical rules (unlike the ABA's Model Rules), even perjury by the client in open court while represented by the attorney would not permit the attorney to disclose confidences. *Compare* D.C. Rule Prof. Conduct 3.3(b) & (d) (and Comments [6] & [7]) *with* ABA Model Rule 3.3(a)(2) & (4) (and Comments [5]-[12]).[19] Moreover, even if Mr. Foster were alive, the

[19] In any event, neither the Model Rules nor the leading ABA Ethics Committee opinion on the subject of client perjury would require an attorney to disclose perjury given by his client before a grand jury if he learned of it after the fact, which would be the situation under the Independent Counsel's hypothetical if the client were alive and he, instead of his attorney, were subpoenaed and testified falsely about the subjects on which he had conferred with his attorney. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353, at 2-3 & n.3 (1987) (Lawyer's Responsibility with Relation to Client Perjury).

Independent Counsel could not obtain from him directly what he now seeks from Mr. Foster's lawyer. The Independent Counsel could, of course, ask questions eliciting recollections of particular underlying facts, but he could not simply ask Mr. Foster to "tell the grand jury everything you told your lawyer"—which is what he is now, in effect, asking the lawyer. Thus, the Independent Counsel's premise that the information he now seeks from the attorney would have been available from the client during his lifetime (with the lawyer as a backup in case of perjury) is incorrect.[20]

More fundamentally, the Independent Counsel's argument focuses on the wrong issue. The question is not whether the Independent Counsel will be able to learn more from the attorney if the D.C. Circuit's new rule is adopted than he could have learned from the client if he were still alive. Rather, the relevant question is whether *protection* of the confidences would *deprive* the Independent Counsel of any information that would have been available to him *if the attorney-client communication had never taken place*. Of course, if the communication had never occurred, the client's death would have prevented the Independent Counsel from seeking the information from its original source. Thus, as in *Upjohn*, the privilege should be sustained, because "[a]pplication of the attorney-client privilege to

[20] The Independent Counsel's position recalls a line from T.S. Eliot: "[W]hat the dead had no speech for, when living,/ They can tell you, being dead." T.S. ELIOT, FOUR QUARTETS, *Little Gidding*, in THE COMPLETE POEMS AND PLAYS 1909-1950, 115, 139 (1952).

communications such as those involved here, . . . puts the adversary in no worse position than if the communications had never taken place." 449 U.S. at 395.

Finally, the Independent Counsel's argument "proves too much, since it applies to all communications covered by the privilege." *Id.* at 393, n.2. If, as the Independent Counsel suggests, an attorney's obligation (in some jurisdictions) to expose perjury by his client is a reason for eliminating the privilege after death, it would seem equally valid as a reason for eliminating the privilege altogether, and simply going to the attorney for information in the first instance, eliminating the unnecessary middle step of putting the client on the stand and using his attorney as a check on his testimony. The ABA has taken a strong position on a lawyer's ethical obligation not to be a party to client perjury, *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987); *see also Nix v. Whiteside*, 475 U.S. 157 (1986), but that obligation cannot be bootstrapped into an argument for eliminating the privilege when there has been no perjury.

This Court has recognized that "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Notwithstanding the Independent Counsel's protestations, denying the protection of the privilege to the communications at issue here would have precisely that effect. Absent disclosure to the attorney, the client would have been assured that his death would seal his secrets. Thus, denying the privilege after death would necessarily make the information "more readily obtained from the attorney following disclosure" than it would have been from the client absent the disclosure. The policies

underlying the privilege thus require its application, and there is no basis for eliminating it simply to relieve the Independent Counsel from the ordinary consequence of the death of a witness—loss of the witness' testimony.

E. The Lower Court's Opinion Is Likely to Have a Far-Reaching Negative Impact on Attorney-Client Communications

The resolution of the privilege issue in this case, although it technically will apply only in federal proceedings, will have a far larger practical impact. Given the scope of federal criminal investigations, clients throughout the country will have reason to fear that their confidences might someday become relevant to federal criminal proceedings before grand juries or courts. Even though client confidences may be fully protected under the law of the state in which they are made, the D.C. Circuit's new federal rule would negate those protections in a federal criminal proceeding.[21] For exactly this reason, this Court has recognized the undesirability of federal privilege rules that have the effect of frustrating the purpose of state-law rules that foster socially valuable confidential communications. *Jaffee v. Redmond*, 116 S. Ct. at 1930.

If the D.C. Circuit's ruling is sustained, conscientious attorneys everywhere will advise their clients—regardless of whether their death may seem imminent—that they should assume their communications will *not* remain confidential after they die. A cautious client may well respond by withholding information that is necessary to effective representation by the lawyer. To be sure, the degree to which attorney-client confidences may be chilled by the creation of this or any other exception to the privilege cannot be

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[21] *See* FED. R. EVID. 501 (providing that federal common law of privilege governs in federal courts except where state law provides the substantive rule of decision on a claim or defense in a civil action).

measured; but this Court has never demanded proof that disclosure will have a quantifiable adverse effect. *See, e.g.*, *Upjohn*, *supra*; *Jaffee v. Redmond*, *supra*. It suffices that the same "reason and experience" that led to the recognition of the privilege in the first instance indicate that it should remain applicable to the communications at issue here.

There are undoubtedly many thousands of people who live in the expectation of death and who want, and would benefit from, legal advice about matters that are personally embarrassing at the least and that might have even more serious consequences for surviving loved ones and friends. As Judge Tatel correctly observed in his dissenting opinion, the assurance of confidentiality that can be given by lawyers to such clients under the rule adopted by the panel below is tenuous. Indeed, even clients who have no particular reason to believe that they will soon die must, under the D.C. Circuit's ruling, contemplate the possibility that their confidences may be revealed in the event of their death, which, even if not imminent, is certainly inevitable. Mindful that "[a]n uncertain privilege . . . is little better than no privilege at all," *Upjohn*, 449 U.S. at 393, this Court should reject the D.C. Circuit's new exception.

In sum, the D.C. Circuit's newly created exception to the attorney-client privilege is consistent neither with settled precedents nor with any discernible "current trends in the law," *United States v. Zolin*, 491 U.S. 554, 570 (1989), and it would "place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Id.* at 571. This Court should therefore "decline to adopt it as part of the developing federal common law of evidentiary privileges," because it "does not comport with 'reason and experience.'" *Id.* at 574.

II.

THE COURT OF APPEALS ERRED IN DENYING OPINION WORK-PRODUCT STATUS TO ATTORNEY NOTES OF STATEMENTS MADE IN AN INITIAL CLIENT CONSULTATION

The D.C. Circuit's equally unprecedented denial of opinion work-product protection to an attorney's notes of an initial client interview fundamentally misconceives this Court's precedents concerning the work-product doctrine, by arbitrarily singling out a subset of the category of core, opinion work product and denying it the heightened protection to which it is entitled under longstanding decisions of this Court.

The Court has repeatedly emphasized "'[t]he strong public policy' underlying the work-product doctrine." *Upjohn*, 449 U.S. at 398. The policy was fully articulated in the Court's opinion in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947):

> In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.

The work-product doctrine originated in the civil discovery dispute decided by the Court in *Hickman*, and it has been most fully codified in the discovery provisions of the Federal Rules of Civil Procedure. But it is equally applicable—and perhaps more critically important—in federal criminal matters. As the Court explained in *United States v. Nobles*, 422 U.S. 225, 238 (1975):

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.[22]

Consistent with *Hickman*'s emphasis on maintaining the attorney's thoughts "inviolate," the work-product doctrine provides special protection for "opinion work product"—work product that reveals the attorney's own thoughts. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Nobles*, 422 U.S. at 238. Work product in this core area, unlike non-opinion work product, "cannot be disclosed simply on a showing of

[22] *Nobles* concerned the application of the work-product doctrine in a federal criminal trial. It is equally "clear that discovery by the government in grand jury proceedings is subject to the work-product protection." EPSTEIN, *supra*, at 295; *see also, e.g.*, *In re Sealed Case*, 676 F.2d 793, 810-11 (D.C. Cir. 1982) (holding work-product doctrine applicable in grand jury proceedings); *In re Grand Jury Investigation*, 599 F.2d 1224, 1228 (3d Cir. 1979) (same); *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) (same); *In re Grand Jury Proceedings*, 473 F.2d 840, 842-43 (8th Cir. 1973) (same).

substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 401.

Notes of an attorney's interviews with witnesses have long been at the heart of this Court's definition of opinion work product. As the Court explained in *Upjohn*, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes . . . ." 449 U.S. at 399. In a much-cited passage in his concurring opinion in *Hickman*, Justice Jackson noted that compelling disclosure of such notes, reflecting the attorney's "language, permeated with his inferences," would be "demoralizing to the Bar" in the extreme. 329 U.S. at 516–17. Thus, the Court held in *Upjohn*, "[i]t is clear that this is the sort of material . . . deserving special protection." 449 U.S. at 400.

The D.C. Circuit majority sought to evade this principle by creating a special exception for notes of an initial client interview. But the court's view that such writings—unlike notes of other witness interviews—reflect few of the attorney's own thoughts and opinions does not accord with the experience of practicing lawyers. The court's conception of the lawyer as merely a passive recipient of information in an initial interview misses the mark. Experienced practitioners recognize the initial interview as a critical stage in the representation of the client, in the course of which a skillful lawyer plays an important role in eliciting pertinent information and beginning to give shape to the goals and strategies to be pursued in the matter.[23]

This Court emphasized in *Upjohn* that "*[t]he first step* in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the

[23] *See* FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03, at 3 (3d ed. 1997).

legally relevant." 449 U.S. at 390-91 (emphasis added). Accordingly, lawyers in the initial interview begin to "assess[] the truth and accuracy of a client's story based upon her comments, manner, delivery and gestures,"[24] guide the discussion toward facts and issues they perceive to be relevant, and discuss possible alternative courses of action to be pursued. A good lawyer's conduct of such an interview reflects recognition that "[t]he initial interview can set the tone for the entire case,"[25] and that the objective is "to identify the client's hidden agenda" so that the lawyer may "address the most critical matters immediately and design [the lawyer's] overall approach around the client's particular needs."[26] The lawyer's notes taken in this process necessarily reflect not only the way he or she has helped shape the interview, but also the lawyer's professional judgment about the relative importance of the various subjects discussed.

The D.C. Circuit's denial of opinion work-product status to the notes in this case thus represents a significant breach in the protection afforded to lawyers' thoughts and mental impressions formed in anticipation of litigation. A predictable result of such a rule would be, as the Court observed in *Hickman*, that "much of what is now put down in writing would remain unwritten." 329 U.S. at 511. Moreover, there is no guarantee that a rule making such materials readily discoverable would stop at written notes. Indeed, if the Independent Counsel is successful in obtaining counsel's notes, can anyone doubt that the next step will be a subpoena directing the attorney to appear before the grand jury to

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[24] LANE, *supra*, §1.07, at 5.

[25] NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT 1 (ABA Sec. of Law Practice Management 1996).

[26] STANLEY S. CLAWAR, YOU & YOUR CLIENTS: A GUIDE TO CLIENT MANAGEMENT SKILLS FOR A MORE SUCCESSFUL PRACTICE 3 (ABA Gen. Practice Sec. 2d ed. 1996).

identify them, explain and interpret them, vouch for their accuracy, and add his own recollections and mental impressions of what his client told him in the interview? It is difficult to perceive a logical stopping-point to the probing of the attorney's mental impressions once it has begun.

Again, Justice Jackson's words aptly capture the potential impact of such an inquest into the lawyer's thoughts:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice . . . secondarily but certainly.

Hickman v. Taylor, 329 U.S. at 514–15 (Jackson, J., concurring).

CONCLUSION

The issues decided in the court below are of grave concern to the legal profession. As one observer has written:

> Lawyers fret that the protections of the attorney-client privilege and the work-product immunity are being eroded. The fear is hardly surprising. Of all the evidentiary and discovery rules, these two go to the heart of both the lawyer's relationship with a client and the lawyer's jealously guarded right to develop

litigation strategies without fear of compelled disclosure to an adversary.[27]

Ultimately, however, the interests at issue are not those of lawyers, but of their clients, whose legitimate right to obtain legal services the privilege and the work-product doctrine are designed to protect. The decision of the D.C. Circuit in this case substantially erodes the scope of the attorney-client privilege and work-product protections as applied in the federal courts, with significant practical consequences for attorneys and their clients nationwide. This Court should restore the proper balance by reversing the decision of the court of appeals.

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[27] EPSTEIN, *supra*, at 450.